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Shukri bin Mohamad v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–14–92

B EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND WAN ADNAN FCJJ

9 OCTOBER 1995

Criminal Law *— Dangerous Drugs Act — Section 2 — Definition of cannabis — Unclear whether chemist was referring to 'cannabis' within s 2 or 'cannabis (Indian hemp)' under First Schedule — Different offences with different penalties — Approach court should take — Dangerous Drugs Act 1952 ss 2, 12(2) & 39B(1)(a)*

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Criminal Law *— Dangerous Drugs Act — Sections 39B(1)(a), 12(2) — Trafficking in dangerous drugs — Evidence of chemist ambiguous — Doubts raised whether chemist was referring to 'cannabis' or 'cannabis (Indian hemp)' — Whether presumption of trafficking could arise — Whether court should make finding in the lower degree — Substitution of charge — Dangerous Drugs Act 1952 ss 12(3), 37(da) & 39B(1)(a)*

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The appellant had been convicted upon a charge that he did on 30 December 1987 traffick in a dangerous drug, ie cannabis, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death, that being the mandatory sentence under s 39B(2). He appealed on the ground that the trial judge was wrong in relying on the evidence of the chemist because it created a doubt as to whether the substance he had analysed was 'cannabis' within the meaning of s 2 of the Act, prior to its amendment on 4 September 1992, or 'cannabis (Indian Hemp)', a drug listed in Pt III of the First Schedule of the Act.

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Held, allowing the appeal:

(1) The record showed that all the chemist had said on the point at issue was that his examination and analysis of the substance showed that it was 'cannabis as defined in the Dangerous Drugs Act 1952' without mentioning s 2 of the Act. This glaring omission could give rise to the inference that he did not have in mind the ingredients of cannabis as defined in s 2. He also made no mention of the results of his physical examination of the substance or whether he had carried out any tests thereon. The combined effect of these infirmities, which were overlooked by the judge, was that the substance could either be 'cannabis' within the meaning of s 2 of the Act, or 'cannabis (Indian hemp)' listed in Pt III of the First Schedule of the Act.

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(2) Under the Act, 'cannabis' and 'cannabis (Indian hemp)' even though of the same weight, may be differently penalized, ie they may constitute the subject matter of different offences, in which case the presumption of trafficking under s 37(da) could not arise. When, as in this case, the court was left in doubt as the whether the accused had committed an offence in a lower or

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higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in the higher degree would give rise to a mandatory death sentence. A

(3) Accordingly, the conviction under s 39B(1)(a) would be quashed, the sentence of death set aside, and substituted with a conviction under s 12(2) and the maximum sentence of five years' imprisonment under s 12(3) to take effect from the date of arrest. B

[Bahasa Malaysia summary

Perayu telah disabitkan atas tuduhan bahawa beliau telah pada 30 Disember 1987 mengedar dadah berbahaya, iaitu ganja, yang melanggar s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta itu') dan dijatuhkan hukuman mati, yang merupakan hukuman mandatori di bawah s 39B(2). Beliau telah membuat rayuan atas alasan bahawa hakim perbicaraan telah membuat kesilapan dengan bergantung hanya pada keterangan ahli kimia kerana keterangannya menimbulkan keraguan sama ada bahan yang dianalisanya itu adalah 'ganja' dalam erti maksud s 2 Akta itu, sebelum pindaannya pada 4 September 1992 ataupun 'ganja (Hemp dari India)', suatu dadah yang disenaraikan dalam Bah III dalam Jadual Pertama Akta itu. C D

Diputuskan, membenarkan rayuan itu: E

(1) Rekod menunjukkan bahawa apa yang dinyatakan oleh ahli kimia itu mengenai perkara yang dipertikaikan adalah bahawa pemeriksaan dan analisa beliau atas bahan tersebut menunjukkan bahawa ia adalah 'ganja seperti yang ditakrif di dalam Akta Dadah Berbahaya 1952' tanpa menyebut tentang s 2 Akta itu. Peninggalan jelas ini boleh menimbulkan inferens bahawa beliau tidak memikirkan tentang bahan kandungan ganja seperti yang ditakrifkan di dalam s 2. Beliau juga tidak menyebut tentang hasil pemeriksaan fizikal bahan itu ataupun sama ada beliau telah menjalankan apa-apa ujian ke atasnya. Kesan gabungan kelemahan-kelemahan ini, yang terlepas perhatian hakim perbicaraan, adalah bahawa bahan itu mungkin adalah 'ganja' mengikut maksud s 2 Akta itu, ataupun 'ganja (Hemp dari India)' yang disenaraikan di dalam Bah III Jadual Pertama Akta itu. F G H

(2) Mengikut Akta itu, 'ganja' dan 'ganja (Hemp dari India)' walaupun mempunyai berat yang sama, boleh dihukum secara berlainan, iaitu mereka bolah menjadi isi perkara kesalahan yang berlainan, dan dalam kes sedemikian, anggapan mengedar dadah di bawah s 37(da) tidak boleh timbul. Apabila, seperti di dalam kes ini, mahkamah mempunyai keraguan sama ada tertuduh telah melakukan suatu kesalahan pada darjah keseriusan yang lebih rendah atau lebih tinggi, mahkamah seharusnya membuat keputusan bahawa kesalahan itu dilakukan pada darjah yang I

lebih rendah, terutamanya di mana suatu keputusan bahawa kesalahan itu dilakukan pada darjah yang lebih tinggi akan membawa hukuman mati mandatori.

(3) Lantaran itu, sabitan di bawah s 39B(1)(a) akan dibatalkan, hukuman mati diketepikan dan diganti oleh suatu sabitan di bawah s 12(2) dan hukuman penjara maksimum selama lima tahun di bawah s 12(3) bermula dari tarikh penangkapan.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 849–870.

Cases referred to

DPP v Tan Ah Guat [1947] MLJ 32 (refd)
Ho Kiat Swee v R [1947] MLJ 159 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (distd)
Law Society of India v Fertilizers and Chemicals Travancore Ltd & Ors AIR 1994 Ker 308 (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11 (refd)
Munusamy v PP [1987] 1 MLJ 492 (distd)
PP v Alcontara [1993] 3 MLJ 568 (refd)
Teoh Soo Tok v PP [1961] MLJ 74 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 399
Dangerous Drugs Act 1952 ss 2(1), 11(1), 12(2), (3), 37(da), 39B(1)(a), (2), First Schedule
Dangerous Drugs Ordinance 1952 s 2
Liquors Revenue Ordinance
Opium and Chandu Proclamation No 43 of 1946
Criminal Procedure Code s 427 [Sing]

Appeal from: Criminal Trial No 47–1 of 1989 (High Court, Kota Bharu)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Azahar bin Mohamed (*Mohd Yusof bin Zainal Abidin* with him) (Deputy Public Prosecutors) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): This appellant was convicted upon a charge that he did on 30 December 1987, at Km 31, Jalan Kampong Bukit Tanah, Bukit Jawa, in the district of Pasir Puteh, in the state of Kelantan, jointly, with one Fauzi bin Ab

Rahim, traffick in a dangerous drug, to wit 36kg of cannabis, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death, that being the mandatory sentence provided under s 39B(2). A

The judge had, however, acquitted and discharged the accused Fauzi bin Ab Rahim at the close of the case for the prosecution and so should have, but did not, delete the word 'jointly' from the charge when calling upon the appellant to enter upon his defence. This point was not taken by counsel for the appellant and therefore we say nothing more about it. B

The petition of appeal, as amended to include additional grounds of appeal, had attacked the conviction on a number of grounds but, before us, counsel for the appellant elected to confine his contention to only ground 3 of the additional grounds, which alleged (with some amplification) that the trial judge was wrong in relying on the evidence of the chemist SP9, Mohan s/o Gangadharan, which evidence had created a doubt as to whether the substance he had analysed was '*cannabis*' within the meaning of s 2(1) of the Act, prior to its amendment on 4 September 1992 by Act A834, that is to say, the Dangerous Drugs (Amendment) Act 1992 or '*cannabis (Indian Hemp)*', a drug listed in Pt III of the First Schedule of the Act, though nowhere defined in the Act. C D

A scrutiny of the record provided shows that, in essence, all the chemist had said on the point at issue was that the result of his examination and analysis of the various quantities of plant material which constituted the subject matter of the charge aforesaid, showed that in each case it was '*Cannabis as defined in the Dangerous Drugs Act 1952*'. The aggregate net weight of the cannabis being 25,664.8g. The judge's notes of evidence shows that there were repeated references by the chemist to the expression 'Cannabis as defined in the DDA 1952' with no mention made at any time of the definition section in the Act, of cannabis, to wit, s 2, which at the material time, provided as follows: "'cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated". E F G

The glaring omission by the chemist to refer to s 2 of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein, and as explained in the Supreme Court case of *PP v Alcontara* [1993] 3 MLJ 568 at p 577.

In *DPP v Tan Ah Guat* [1947] MLJ 32, arising out of a prosecution for unlawful possession of dutiable liquor under the Liquors Revenue Ordinance, an order had been made by the magistrate that the taxi in which the alleged dutiable liquor had been found, should be restored to the respondent who was the driver of the taxi. On appeal by the deputy prosecutor against that order, Brown J said, inter alia, this: H I

> But what was fatal to the prosecution case was that the certificate (even if it had been admissible) failed to prove that the alleged samsu was 'intoxicating liquor' under the definition contained in the Ordinance. There are two ingredients of that definition:

A (a) that it contained more than 2% alcohol by weight;

(b) that it is fit (or intended) for use as a beverage.

The first was proved. The second was not. And I would observe that it is highly desirable (even though not strictly necessary) that the wording of the definition should be followed in the certificate.

B Accordingly, it was held that no offence was proved to have been committed.

The certificate referred to in *Tan Ah Guat* was a certificate under s 427 of the Singapore Criminal Procedure Code (in pari materia with s 399 of our Criminal Procedure Code (FMS Cap 6)).

C Similarly, in *Ho Kiat Swee v R* [1947] MLJ 159, the accused had been prosecuted and convicted for unlawful possession of chandu, an offence under the Opium and Chandu Proclamation No 43 of 1946. In quashing the conviction, Jobling J said this:

The certificate in this case is an extremely unsatisfactory one. It is the only evidence for the prosecution that the article found on the accused's premises D is chandu within the meaning of this term in the Opium and Chandu Proclamation No 43 of 1946.

I think it is a sufficient certificate of a chemist of the Department of Chemistry and so far complies with the provisions of the law but it does not show that the chemist who signed the certificate analysed the articles sent to him or any one of them. Further it does not show that when he refers to the E articles as chandu he was aware of the technical definition of the word 'chandu' in the proclamation (para 23) and was satisfied that it came within that definition.

In the circumstances I take the view that the prosecution has not proved its case in the matter and my only course is to quash the conviction and the conviction is quashed accordingly. F

In the present case, the testimony of the chemist also suffered from the defects that it made no mention of the results of his physical examination nor did he mention whether he had carried out any, and if so, what tests. We are thus reminded of some of the infirmities from which the testimony of the chemist in the Supreme Court case of *Leong Bon Huat v PP* [1993] G 3 MLJ 11 suffered which are summarized in the following passage of the judgment of the court (at p 14C):

It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what H were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the court as to what were the tests he conducted using chemical methods; for example, did he resort to the Dequenois Levine test and/or the thin layer chromatography test? If so, what were the results of those tests?

I At this point, we must advert to the cases of *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265, in particular to the judgment of the Lord President, and *Munusamy v PP* [1987] 1 MLJ 492, upon which the prosecution laid much stress. In our view, both these cases are readily distinguishable on the facts.

In *Khoo Hi Chiang*, the charge was also for trafficking in a dangerous drug in contravention of s 39B(1)(a) of the Act, but the subject matter was *42.23kg of raw opium*, so that there was no possibility of it being a different drug which could have constituted the subject matter of a non-capital charge, as in the present case. Furthermore, the point with which we are concerned — assuming it to have been arguable, at all — was neither argued nor decided upon.

In *Munusamy*, the charge was for trafficking in cannabis in contravention of s 39B(1)(a) of the Act, but the testimony of the chemist did not suffer from the same infirmities to which we have directed attention in the present case. In any event, the precise point which arises for decision in the present case was never raised in argument and so did not arise acutely for decision in that case either in the High Court or in the Supreme Court.

It follows, therefore, that neither *Khoo Hi Chiang* nor *Munusamy* is of any assistance to the prosecution.

Turning to the grounds of judgment, we note that nowhere in it is there any indication that the judge recognized the infirmities in the testimony of the chemist to which we have adverted nor did he even make the basic finding of fact that the plant material which was the subject matter of the charge was 'cannabis' within the meaning of s 2 of the Act. As was said, by the court, in *Law Society of India v Fertilizers and Chemicals Travancore Ltd & Ors* AIR 1994 Ker 308, it must not be lost sight of that experts give evidence and do not decide the issue.

Having regard to the infirmities in the testimony of the chemist to which we have adverted, his testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s 2 of the Act *or* that it was 'cannabis (Indian Hemp)' listed in Pt III of the First Schedule of the Act, though nowhere defined in the Act.

We hasten to add that 'Indian Hemp' was defined in s 2 of the Dangerous Drugs Ordinance 1952, in the form that it took prior to its deletion by the Dangerous Drugs (Amendment) Act 1972, as follows:

> The dried flowering or fruiting tops of the pistillate plant Cannabis Sativa L, from which the resin has not been extracted, under whatever name they may be designated in commerce.

which definition, as explained by Rigby J (as he then was) in *Teoh Soo Tok v PP* [1961] MLJ 74, still affords useful guidance, as to what constitutes 'cannabis (Indian Hemp)'.

On the other hand, as we have said, 'cannabis' has been defined in s 2 of the Act and later amended by Act A834, Dangerous Drugs (Amendment) Act 1992, to read:

> any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated.

as explained in *Alcontara*'s case.

A The next question to be logically considered is whether cannabis and cannabis (Indian Hemp) even though of the same weight *may* be differently penalized.

Section 11(1) of the Act which comes under Pt IV of the Act, bears the main heading: 'Control of Certain Dangerous Drugs', and the sub-
B heading 'Extent of application of Part IV', provides:

> This Part applies to dangerous drugs listed in *Parts III*, IV and V of the First Schedule. (Emphasis added.)

'Cannabis (Indian Hemp)' is listed, amongst other dangerous drugs, in Pt III of the First Schedule of the Act. Section 12(2), which comes under
C Pt IV of the Act provides:

> No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorised to be in possession, custody or control of such drug or is deemed to be so authorised under this Act or the regulations made thereunder.

D Therefore, the inevitable conclusion is that being found in possession, custody or control of 'cannabis (Indian Hemp)', without the necessary authorisation, is an offence under s 12(2) and therefore punishable under s 12(3) which provides:

> Any person who contravenes the provisions of sub-section (2) or this
E section shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

We need hardly add, that if, as we find, that in the context of the relevant legislation 'cannabis' or 'cannabis (Indian Hemp)' even though of the
F same weight may not be the same thing, in the sense that they may constitute the subject matter of different offences which may be differently penalised, then the presumption of trafficking under s 37(da) of the Act cannot arise, in the present case, since it says, inter alia:

> any person who is found in possession of —
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> (vi) 200 grammes or more in weight of cannabis;
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> (vii) 200 grammes or more in weight of cannabis resin;
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> (viii) a total of 200 grammes or more in weight of cannabis and cannabis resin;
>
> ...
>
H otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

It is a familiar canon of construction that where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly
I penal statute — and, a fortiori, where what is at stake is human life — that in favour of the accused should be adopted. We are supported in this by the following passage in Maxwell on *Interpretation of Statutes* (11th Ed) at pp 254–255, which reads:

> But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

When, therefore, as here, the court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness the court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death. (See *Leong Bon Huat*'s case [1993] 3 MLJ 11 at p 15E–F.)

In the result, we allow the appeal, quash the conviction, set aside the sentence of death, and substitute, in lieu thereof, a conviction under s 12(2) of the Act, and a sentence of five years' imprisonment which, it will be recalled, is the maximum sentence of imprisonment provided under s 12(3) to take effect from date of arrest.

For the avoidance of doubt, we should like to make it clear that although we have adverted to a number of infirmities both in the testimony of the chemist and the grounds of judgment of the judge, the conviction herein has been quashed solely on ground 3 of the additional grounds of appeal hereinbefore referred to. The other points to which we have referred, though substantial, are merely by way of make weight only.

Appeal allowed.

Reported by Prof Ahmad Ibrahim